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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 851

INDIANAPOLIS POWER & LIGHT COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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STIPULATION CONCERNING RECORD

There is on file with the Clerk of the Supreme Court a stipulation concerning the record herein, which, omitting caption, and title, is as follows:

SUBJECT TO THIS COURT'S APPROVAL, IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto, that for the purposes of the petition for a writ of certiorari, the printed record may consist of the following:

1. Appendices A and B to petitioner's brief in the Court below.

2. Appendix to respondent's brief in the Court below.

3. The supplemental proceedings before the United States Circuit Court of Appeals for the Seventh Circuit, with the exception of the appearances of counsel and respondent's petition for enlargement of time for filing the certified record with the Court below.

IT IS FURTHER STIPULATED AND AGREED that petitioner will cause the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit to file with the Clerk of the Supreme Court the entire transcript of record certified and filed by the Board in said Circuit Court of Appeals and that, in the event that the petition for writ of certiorari be granted, the printed record shall consist of the proceedings in the court below, and such portions of

the entire transcript of record as certified by the Board to the Court below as the respective parties may designate.

GILLIOM & GILLIOM,
By Arthur L. Gilliom,
Attorneys for Petitioner,
Indianapolis Power & Light Co.

Dated at Indianapolis, Ind., this —— day of October, 1941.

Dated at Washington, D. C., this 3rd day of November, 1941.

Charles Fahy,
Acting Solicitor General of the United States.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. ———

INDIANAPOLIS POWER & LIGHT COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

TO The Honorable Harlan F. Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States.

Your petitioner, Indianapolis Power & Light Company, respectfully shows:

I

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

The proceeding below is one for review by the United States Circuit Court of Appeals for the Seventh Circuit

of a final order of the National Labor Relations Board made against Indianapolis Power & Light Company, the petitioner herein. After the review proceeding was commenced the Board asked enforcement of the order in the same proceeding.

The Board's order was made in a consolidated proceeding covering two cases instituted by the Board against Indianapolis Power & Light Company, a public utility generating and distributing electricity and heat at Indianapolis, Indiana. At the time when the cases were instituted the company also owned and operated radio broadcast station WFBM at Indianapolis, but had sold the station before the cases were heard and had ceased owning or operating it before the Board's order was made.

One of the constituent cases related exclusively to the radio station and to the complaining union in that case, Associated Broadcast Technicians (now known as Associated Broadcast Technicians Unit of the International Brotherhood of Electrical Workers). The Circuit Court of Appeals set aside so much of the Board's order as related to said radio station and union and by which petitioner was ordered to cease and desist from discouraging membership in said union of broadcast technicians after it no longer had any employees eligible thereto and to compensate one technician for the period intervening between the time of his discharge by petitioner and the time when he procured permanent like employment elsewhere.

The other of the constituent cases was instituted on complaint of a C. I. O. union, known as Utility Workers Organizing Committee, Local 120, affiliated with the Congress for Industrial Organizations, and this case related to employees in petitioner's generating plants. The Circuit Court granted modified enforcement of parts

of the Board's order which related to this constituent case. These parts of the order require petitioner to offer to reinstate and make whole two condenser pit operators (Collier and Elbreg) who were included in a general lay off of about seventy employees, made necessary by economic conditions in the fore part of 1938, and also require petitioner to cease and desist from discouraging membership in Utility Workers Organizing Committee, Local 120, affiliated with the Congress for Industrial Organizations, from encouraging membership in or otherwise supporting or assisting I. P. & L. Employees Protective Association or any other labor organization of its employees, or in any other manner interfering with, restraining or coercing its employees in the exercise of the right of self-organization, etc.; also to post notice of compliance with said order.

The petition filed in the Circuit Court of Appeals challenged the adverse parts of the order and findings of the Board for want of supporting evidence. The record discloses that as a matter of law, said adverse parts of the order and findings are not supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusions reached by the Board.

In respect to the Board's order requiring reinstatement of Collier and Elbreg, and which the court has ordered enforced, there is a complete want of evidence to support the Board's finding that these men were discriminatorily discharged. On the contrary, the record shows by direct and undisputed evidence that they were selected with about seventy other employees for lay off in the economic recession in the fore part of 1938 (App. B, pp. 517, 525)[1]

[1] The page references herein made to "App. A" and "App. B" refer to printed Appendices "A" and "B" to petitioner's brief in the Circuit Court of Appeals which by stipulation constitute a part of the record for the purposes of this petition. The appellate proceedings are printed in a volume designated "Vol. III" of the printed record.

on the basis outlined in the General Manager's written order, viz.: "In laying off plant employees, however, the generating system as a whole is to be the governing basis. That is, all plant employees should be considered on the basis of merit, efficiency and length of service with the company. Necessary transfers between plants should be made as far as possible to accomplish this policy." (App. B, pp. 12-14, 505); that in selecting these two men, as well as all the rest, the management gave no thought to the matter of whether any of them did or did not belong to any labor organization (App. B, pp. 509-510) and when these selections were made no one in petitioner's management knew that these two men were affiliated with the C. I. O. union (App. B, pp. 527-528); and that both of these two men admitted in cross-examination that they had never informed anyone in petitioner's management that they were so affiliated (App. B, pp. 233-234, 274).

In respect to the Board's order requiring petitioner to cease and desist from encouraging or assisting I. P. & L. Employees Protective Association and coercing membership therein, and which the court ordered enforced, there is no evidence whatever to support the Board's findings that the petitioner engaged in such practice, and the Trial Examiner expressly found there was no evidence to support that conclusion (App. A, p. 61). The record shows affirmatively that petitioner had nothing to do with said Association until it had been voluntarily formed by the employees and more than a majority belonged thereto and had demanded recognition (App. B, pp. 79-80, 122-123) and that the only thing that petitioner has had to do with said Association was to bargain collectively with it and enter into a contract with it (App. B, pp. 98, 81-93). There was no attempt in these proceedings to disestablish the Association and there is no order to that effect.

In respect to the Board's order requiring petitioner to cease and desist from discouraging membership in the C. I. O. union and from interfering with rights of employees guaranteed by the National Labor Relations Act, and which the court ordered enforced, there is not substantial evidence to support the Board's finding that petitioner engaged in such practice. On the contrary, the record affirmatively shows by direct evidence that when it came to petitioner's attention that plant employees were killing time while on duty talking about union matters they were called in meeting by the plant superintendent under the instructions of the President and General Manager and were told the authoritative attitude of petitioner as determined by its President, viz.: that each employee was free to join or not join any union but that neither company time nor property should be utilized for that purpose and that while on duty they should give their time efficiently to their work for the company (App. B, pp. 536-538, 540-541, 606). Not a single employee was shown ever to have been threatened or coerced with respect to affiliation with the C. I. O. union or with respect to any labor organization, and there is no evidence that a single employee desiring to join the C. I. O. union or any other labor organization ever refrained from so doing.

In respect to the Board's order requiring petitioner generally to cease and desist from interfering with rights of employees under the Act, and which the court ordered enforced, there is no evidence to support the Board's finding that petitioner engaged in such practice. For support of such finding, the Board seized on the circumstance that six unorganized condenser pit operators, a year before there was any organizational activity, desired to talk with their superior in a group concerning their

wages and that the superior discouraged discussion of that matter with them in a group but was willing to discuss the wage matter with them individually (App. B, pp. 217-220, 242-244, 271-272, 564-566).

There were two successive opinions delivered and filed in the case by the Circuit Court of Appeals. These opinions clearly disclose that the court erroneously deemed itself precluded by "recent rulings of the Supreme Court," particularly by the opinion and decision in *N. L. R. B. v. Link-Belt Co.*, 311 U. S. 584 (reversing that court), from making the inquiry and determination of law whether there is in this case such relevant evidence as a reasonable mind might accept as adequate to support the parts of the Board's order as to which the court granted enforcement and to support the Board's findings underlying said parts of the order. These opinions also disclose that the Circuit Court of Appeals erroneously deemed itself bound by the Board's inferences and findings because of said "recent rulings of the Supreme Court" and the cases cited in said opinions, but not by reason of any belief of its own that said inferences and findings were as a matter of law supported by such relevant evidence as a reasonable mind might accept as adequate to support the same.

Notwithstanding the state of the evidence as hereinbefore indicated, the court's opinions disclose that the court, by reason of "recent rulings of the Supreme Court" and the cited cases referred to in said opinions, deemed itself "constrained" to treat the Board's findings concerning interference as conclusive and deemed itself "powerless to disturb the Board's findings with respect to Collier and Elbreg" and "not permitted to disturb the order based on the finding of the discriminatory discharges". It is apparent from these opinions that the

court did not inquire into and determine the law question of whether these findings of interference and discriminatory discharge and the parts of the order based thereon are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. If such inquiry and determination of such law question were made, it would be found that such findings and said parts of the order based thereon are not supported by evidence within the meaning of Section 10 (f) of the National Labor Relations Act as interpreted by the applicable decisions of the Supreme Court.

Petitioner feels itself aggrieved because enforcement was granted without there being evidence to support such order and without there having been an actual judicial review by the Circuit Court of Appeals as contemplated by Sec. 10 (f) of the Act to determine whether the order to be enforced is supported by evidence.

II

STATEMENT OF BASIS FOR JURISDICTION OF SUPREME COURT

Jurisdiction is conferred on the Supreme Court to review on writ of certiorari the judgment and decree in question by Sec. 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938; 28 U. S. C. A. 347.

The case was brought in the United States Circuit Court of Appeals for the Seventh Circuit by the petitioner herein, Indianapolis Power & Light Company of Indianapolis, Indiana, under the provisions of Sec. 10 (f) of the National Labor Relations Act (49 Stat. 453; 29 U. S. C. A. 160 (f)), for the review of a final order made against said petitioner

by the National Labor Relations Board on July 6, 1940. Thereafter and in the same proceeding, the Board asked enforcement of said order.

Said Circuit Court of Appeals, in the said proceeding, on May 14, 1941, filed its first opinion in the cause, and on September 15, 1941, the court filed its final opinion. On October 9, 1941, said court denied said petitioner's petition for rehearing. On October 29, 1941, said court entered its judgment and decree setting aside said order in part and granting modified enforcement as to the remainder thereof. The Board's motion for a resettlement of said decree was denied by said court on November 27, 1941.

Within 90 days from the date of denial of said petition for rehearing, this petition for a writ of certiorari was filed by said petitioner on January 8, 1942.

Said final opinion, omitting caption and title, is as follows:

"Before EVANS and SPARKS, Circuit Judges, and WOODWARD, District Judge.

SPARKS, Circuit Judge. Petitioner asks this court to review and set aside an order of the Labor Board, and the Board asks that we enforce it. The complaints upon which the order was based charged, among other things, the commission of the acts referred to in the order, the pertinent parts of which we set forth in the margin.[1] The complaint also

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1 "* * * the National Labor Relations Board hereby orders that the respondent, Indianapolis Power & Light Company, Indianapolis, Indiana, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Utility Workers Organizing Committee, * * * affiliated with Congress of Industrial Organizations, in Associated Broadcast Technicians Unit * * * affiliated with American Federation of Labor, or in any other labor organization of its employees, by discharging

charged surveillance, and the discriminatory discharge of three additional employees not included in the order of reinstatement. These charges, however, were dismissed by the Board on recommendation of the Trial Examiner after hearing.[2]

It was stipulated that petitioner is an Indiana public utility corporation, primarily engaged in the pro-

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or by laying off any of its employees or in any other manner discriminating in regard to their hire or tenure of employment or any term or condition of their employment;

(b) Encouraging membership in or otherwise supporting or assisting Indianapolis Power & Light Employees' Protective Association, * * * or any other labor organization of its employees, by discrimination in regard to hire or tenure or employment or any term or condition of employment, by urging, persuading, warning, or coercing employees to join such labor organization and/or to resign from or refuse to join U. W. O. C., A. B. T., or any other labor organization of its employees; or by any other act or acts; and

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purposes of collective bargaining or other mutual aid or protection.

"2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Make whole Russell Rennaker for any loss of pay * * * by payment * * * of the amount he normally would have earned as wages from January 15, 1938, until February 1, 1939, * * *;

(b) Offer to Sidney Collier and Thomas Elbreg, * * * immediate and full reinstatement to the positions which they formerly occupied * * * and make them, * * * whole for any loss of pay * * *;

(c) Post * * * notices to its employees, stating (1) that the respondent will not engage in the conduct which it is ordered to cease and desist in paragraphs 1 (a), (b), and (c) of the Order, * * * (2) that the respondent will take the affirmative action set forth in paragraphs 2 (a) and (b) of this order; (3) that its employees are free to become or remain members of U. W. O. C.; * * * A. B. T.; or any other labor organization, and (4) that it will not discriminate against any employee because of membership in or activity in behalf of such labor organization; * * *"

[2] "AND IT IS FURTHER ORDERED that the complaint, as amended, in so far as it alleges that the respondent engaged in unfair labor practices in connection with Roy Payton, Harry Wilkins, and Dewey Logsdon, or in connection with surveillance of its employees and meetings of A. B. T. * * * or in connection with the formation of * * * I. P. and L. Employees Protective Association, be, and the same hereby is, dismissed."

duction and distribution of electricity and steam at Indianapolis; that, incidentally, it also conducts in that locality a local retail department for the sale of electrical appliances; that it formerly owned and operated a radio broadcast station, WFBM, at Indianapolis, but this had been sold and transferred to a separate corporation, with the approval of the Federal Communications Commission, as of August 1, 1939, which was prior to the date of completion of hearings on the complaint; that after this transfer petitioner no longer had any employees at that or any radio station.

Two complaints were filed against petitioner, one arising out of its relation to one of its employees in the radio station, and the other to five employees in the generating plants. They were consolidated for hearing and for purposes of this review.

Petitioner challenges the Board's jurisdiction to enter the order against it as to either complaint. With respect to the radio station it urges that it no longer owned or operated that business at the time of the order, and that the one employee it was alleged to have discriminatorily discharged was engaged in other equivalent employment when the order was entered. Hence, it argues that his discharge could not furnish the basis for a valid order for payment of wages lost thereby. With respect to the generating plants, it insists that jurisdiction was lacking because of the local nature of their operations, which it contends did not involve interstate commerce.

Under the issues joined by the complaint and answer it is obvious that the Board had jurisdiction to pass upon those issues, whether its determination of them was right or wrong. The questions here, however, deal with the correctness of the Board's order in the light of the facts, that is to say—did the alleged unfair labor practices actually threaten interstate or foreign commerce in a substantial manner, and was

there substantial evidence to support the Board's finding?

It is conceded that the employees at the generating plants are not themselves engaged in interstate or foreign commerce. In *Edison Co. v. Labor Board,* 305 U. S. 197, at p. 223, the Court said: "* * * where the employers are not themselves engaged in interstate or foreign commerce, and the authority of the National Labor Relations Board is invoked to protect that commerce from interference or injury arising from the employers' interstate activities, the question whether the alleged unfair labor practices do actually threaten interstate or foreign commerce in a *substantial manner* is necessarily presented. And in determining that factual question regard should be had to all the existing circumstances, * * *. The justification for the exercise of federal power should clearly appear. *Florida v. United States,* 282 U. S. 194, 211, 212. But the question in such a case would relate not to the *existence* of the federal power but to the propriety of its exercise on a given state of facts." (Our italics.)

The facts upon which the Board relied in support of its jurisdiction over petitioner's generating plants engaged in its operations as a public utility are similar in many respects to those described in the Edison Company case, *supra.* There the Court held that the provisions of the Labor Relations Act extended to public utilities engaged in supplying electricity, gas and steam wholly within the state (with the possible exception of that supplied for the operation of the Holland Tunnel), where a part of the service was to railroads, an airport, two telegraph companies, a telephone company and steamships engaged in interstate or foreign commerce, as well as to the various federal buildings in the city. Under the ruling of that case, we feel impelled to hold that the Board had jurisdiction over petitioner's generating plants. We shall discuss later the question of the power of the Board to enter

the order with relation to petitioner as owner and operator of the radio station.

Petitioner next contends that even if the Board had jurisdiction to enter the order pertaining to employees other than those employed at station WFBM, there is no substantial evidence to support its findings that petitioner interfered with any rights guaranteed by Sec. 7 of the Act to its generating plant employees, or that it discouraged membership in the C. I. O. union and encouraged membership in the I. P. and L. Employees Protective Association (to which we shall refer as the Association), or that it discharged Elbreg and Collier because of their activity in support of the C. I. O. union.

While the evidence was by no means undisputed, we can not say under the recent rulings of the Supreme Court, that there was none of sufficient substance to support the following facts as found by the Board. In February, 1937, before any union was organized or attempted to be organized, the six condenser pit operators employed at one of the plants had decided to make a collective request relating to working conditions through the chief engineer at that plant. Before they did so, the engineer, Goodrich, learned of their decision and talked to them individually, telling them they were absolutely wrong to try to approach petitioner collectively, and that while it would confer with individual operators about working conditions, it would not meet with them as a group. Thereafter, the C. I. O. undertook to organize workers at the generating plants, and after an organizational meeting, a local was formed, and Collier and Elbreg were elected president and secretary in August, 1937. There is evidence, though disputed, that the management sought by inquiry and admonition to discourage enrollment in that union. Under the many rulings of the Supreme Court relating to the conclusiveness of the Board's findings, we are constrained to

hold that there was evidence in support of the finding that petitioner interfered with, restrained, and coerced its employees in the exercise of rights guaranteed by Sec. 7 of the Act.

In December, 1937, petitioner's general manager sent two communications, the first addressed to department heads, and the second to Goodrich, superintendent of plants, calling for a general reduction in operating expenses, necessitated by failing business and the poor outlook for the future. He called for a reduction in personnel by not replacing employees who left, and by laying off employees wherever possible, stating that in such lay offs, the generating system as a whole was to be considered, and employees were to be considered on the basis of merits, efficiency, and length of service with the company. In response to this requirement of reduction in the personnel, about seventy employees were discharged between January 4 and March 30, 1938, including Collier and Elbreg, who were discharged on January 5, 1938. Of this number only five were members of C. I. O., and the complaint as to the other three was dismissed on motion of respondent.

The Board found that Collier and Elbreg were discharged because of their activities in the union, which by that time had ceased to function. Petitioner introduced what would seem to us convincing evidence to the contrary, were we triers of the facts. However, in view of the fact that the Board is permitted to draw its own inferences from all the facts, and (under the ruling in *Labor Board v. Link-Belt Co.*, 311 U. S. 584) may rely upon such inferences in the absence of direct evidence in support of its findings, in opposition to direct evidence to the contrary, we are not permitted to disturb the order based on the finding of the discriminatory discharges.

The pertinent statute provided that "the findings of the Board as to the facts, if supported by evidence,

shall be conclusive." The Supreme Court has held that the word "evidence" as here used means "substantial evidence," and "* * * is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Edison Co. v. Labor Board,* 305 U. S. 197, at p. 229. The statute further provides that "the rules of evidence prevailing in courts of law and equity shall not be controlling." Section 10(b). The last cited case has this to say on that subject: "The obvious purpose of this and similar provisions is to free administrative boards from the compulsion of technical rules so that the mere admission of matter which would be deemed incompetent in judicial proceedings would not invalidate the administrative order. (Citing cases.) But this assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence."

In addition to these provisions, another section of the same law provides that the aggrieved party may have a review of the Board's order in this court. We have always presumed that this provision authorized us to correct what we in good faith thought was error of law in the Board's findings and order, including the determination whether the Board's findings were based on more than a scintilla of evidence, or upon such relevant evidence as a reasonable mind might accept as adequate to support the conclusion. See *Southern Pacific Co. v. Pool,* 160 U. S. 438, 440; *Edison Co. v. Labor Board, supra,* 229, 230.

In *National Labor Relations Board v. Waterman S. S. Co.,* 309 U. S. 206, the Court said: "* * * Congress has left questions of law which arise before the Board— but not more—ultimately to the traditional review of the judiciary. Not by accident, but in line

with the general policy, Congress has deemed it wise to entrust the finding of facts to these specialized agencies. It is essential that courts regard this division of responsibility which Congress as a matter of policy has embodied in the very statute from which the Court of Appeals derived its jurisdiction to act." This language was quoted in *National Labor Relations Board v. Link-Belt Co.*, 311 U. S. 584.

In that case, the Court further said: " 'Slight suggestions as to the employer's choice between unions may have telling effect among men who know the consequences of incurring that employer's strong displeasure.' Nor does the Board lack the power to give weight to the activities of some of the supervisory employees on behalf of independent, even though they did not have the power to hire or to fire. * * * If the words or deeds of the supervisory employees, taken in their setting, were reasonably likely to have restrained the employees' choice and if the employer may fairly be said to have been responsible for them, they are a proper basis for the conclusion that the employer did interfere." Under these decisions we are powerless to disturb the Board's findings with respect to Collier and Elbreg.

The order as to station WFBM falls into two categories. Petitioner was directed to cease discouraging membership in the A. B. T. union, and it was also ordered to compensate Rennaker for the time lost between his alleged discriminatory discharge, January 15, 1938, and February 1, 1939, when he obtained equivalent employment elsewhere. Petitioner contends that the order was void in both respects.

As grounds for the asserted invalidity relating to the A. B. T. union, petitioner contends that inasmuch as it had sold the radio station prior to the hearing in this proceeding, it then had no employees eligible to membership in that union, and an order relating to it could in no way effectuate the purposes of the Act,

and dealt with matters that were wholly moot. There is no question but that the transfer entirely divested petitioner of all interest in the station, and that it retained no control whatsoever over it; and that a new corporation, WFBM, Inc., had been organized for the purpose of taking over the station prior to the issuance of the complaint against petitioner, articles of incorporation having been approved and filed as of May 23, 1939. The sale had been approved by the Federal Communications Commission July 18, and formal transfer was made as of August 1, 1939.

Section 10(c) of the Act provides that if upon all the testimony taken, the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any unfair labor practice (as defined in Sec. 8), then it shall state its findings of fact and shall issue and cause to be served on such person an order requiring him to cease and desist from such unfair labor practice and to take such affirmative action as will effectuate the policies of the statute. It was held in the case, *Labor Board v. Greyhound Lines,* 303 U. S. 261, that an order, lawful when made, did not become moot because it was *obeyed* or because changing circumstances indicated that the need for it might be *less* than when made. Under that ruling we are not permitted to say that the negative order did not effectuate the purpose of the Act, provided there was evidence of discouragement of Rennaker with respect to his membership in A. B. T.

There is no evidence in this record that either the employer or any of its officers or managers had knowledge that Rennaker, prior to, or at the time of, his discharge, belonged to A. B. T., or that he ever contemplated joining. They denied having such knowledge. The undisputed facts are that he did not join until a short time before he was discharged, because he was not eligible. At that time no one in petitioner's employ was eligible to membership, and Rennaker

never became eligible until A. B. T. changed its rules in that respect. No one in petitioner's employ, except Rennaker, was ever eligible to membership in A. B. T., and he said that he never informed petitioner or any of its officers that he had joined, or was contemplating a membership in A. B. T. He said that he merely signed the application and mailed it, and he did not say that he had informed any one of that fact. Before he was eligible, however, he did ask chief engineer Williams what he thought of A. B. T. Williams replied that he thought that would be the union for him to join. After I. P. L. was formed, Rennaker joined it, and a contract between it and respondent, covering all employees, was entered into on September 3, 1937. In November, 1937, he was notified that he was eligible to membership in A. B. T. Thereupon, he again asked Williams for advice as to what he should do. Williams replied: "No, I would answer the letter, Russ, and I would say that the boys now have an association of I. P. & L. employees and that you are no longer interested in A. B. T. That your present representatives, the employees' association, is serving the purpose admirably and there is no need for any outside connection at this time." Rennaker said: "I thanked him."

In view of the plenitude of the Board's power as set forth in the *Link-Belt* case, *supra*, we are not permitted to say that chief engineer Williams was not a supervisory employee, or that the Board lacked power to give weight to his activities and words, though he had no power to hire or to fire. The rule enunciated in that case, as applied here, is, if the words and deeds of Williams, taken in their setting, were reasonably likely to have restrained Rennaker's choice, and if Indianapolis Power and Light Company may fairly be said to have been responsible for them, they are a proper basis for the conclusion that the employer did interfere, and an order to desist would be proper. The Board, having concluded that there was interference, issued such order, and it is now conceded that this

court is empowered to pass upon the question whether the Board's findings and conclusion in this respect are supported by such relevant evidence as a reasonable mind might accept as adequate to support such findings and conclusion. We think they are not.

It is proper under this rule to consider the setting of the two conversations between Rennaker and Williams, to which we have referred. They were friends, and prior to the times involved Rennaker had sought advice concerning his private affairs from Williams, and had received it. At the time of the first conversation neither Rennaker nor any of petitioner's employees were eligible to membership in A. B. T., but neither party to the conversation was aware of that fact, and Williams advised him to join it. Subsequently, A. B. T. notified Rennaker that it had revised its rules in such manner as to grant him membership, and sent him an application. Thereupon, he again sought Williams' advice with the result hereinbefore detailed. Under these circumstances we think it cannot be fairly said that Williams' words of advice were reasonably likely to have restrained Rennaker's choice. Within a very short time thereafter he became a member of A. B. T., which would indicate beyond doubt that he did not feel restrained by what Williams had said to him. Moreover, we think it cannot be fairly said that the petitioner was responsible, under the circumstances related, for the words or acts of Williams in this respect. For these reasons we think the Board was in error in finding and concluding that petitioner was guilty of interference with respect to its employee or employees joining A. B. T.

Furthermore, there is no evidence in this record that petitioner or any of its officers had knowledge of Rennaker's membership in A. B. T. at the time of, or before, his release as an employee. It knew, however, that he was not satisfied with his position, and had expressed a desire, and an intention, to leave when a

favorable opportunity presented itself to him. Moreover, petitioner's business was in such condition that it deemed it imperative to retrench its expenditures by discharging a number of its employees. We are warranted in taking judicial knowledge that almost every corporation and employer in the United States did precisely that thing, during the years here involved, and it certainly was not an unreasonable or unfair thing to do. Rennaker was informed of these facts by petitioner, and he never at any time, so far as petitioner knew, claimed that he was discharged because of his membership in A. B. T., or because of his union activities. Under these circumstances we think the Board's order with respect to Rennaker is "without a basis in evidence having rational probative force," (*Edison v. Labor Board, supra*), and that neither the findings nor the order of the Board, with respect to Rennaker's discharge, is supported by such evidence as a reasonable mind might accept as adequate for that purpose.

Petitioner further contends that the order to make Rennaker whole is void because at the time it was made he was no longer an employee. Its theory is that the Board's power to order back pay to employees discriminatorily discharged is limited to those cases where employees are lawfully ordered reinstated, and since Rennaker was otherwise employed when the order was made he cannot be considered at that time as an employee of petitioner. The question of the power of the Board to award back pay independently of reinstatement was raised in the case of *Phelps Dodge Corp. v. Labor Board,* decided April 28, 1941, by the Supreme Court. Although the Court did not pass upon the question expressly, the order appears to be within the power of the Board as defined by that decision, and no doubt was intended to be included among the "other minor objections to the Board's order," which the Court deemed it unnecessary to

discuss, agreeing with the disposition of them by the court below.

The Board requested and consented to a modification of that part of its order which provided for payment by petitioner to public work-relief agencies of sums earned by discharged employees on work-relief projects. Petitioner's application to set aside the order of the Board is granted with respect to Rennaker and WFBM, also, as to payments to work-relief agencies. It is overruled with respect to Collier and Elbreg and the generating plants. The Board's petition for an enforcement order is granted, subject to the modifications herein suggested."

Said first opinion, omitting caption and title, is as follows:

"Before EVANS and SPARKS, Circuit Judges, and WOODWARD, District Judge.

SPARKS, Circuit Judge. Petitioner asks this court to review and set aside an order of the Labor Board, and the Board asks that we enforce it. The complaints upon which the order was based charged, among other things, the commission of the acts referred to in the order, the pertinent parts of which we set forth in the margin.[1] The complaint also charged surveillance,

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[1] "* * * the National Labor Relations Board hereby orders that the respondent, Indianapolis Power & Light Company, Indianapolis, Indiana, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Utility Workers Organizing Committee, * * * affiliated with Congress of Industrial Organizations, in Associated Broadcast Technicians Unit * * * affiliated with American Federation of Labor, or in any other labor organization of its employees, by discharging or by laying off any of its employees or in any other manner discriminating in regard to their hire or tenure of employment or any term or condition of their employment;

(b) Encouraging membership in or otherwise supporting or assisting Indianapolis Power & Light Employees' Protective Association, * * * or any other labor organization of its employees, by discrimination in regard to hire or tenure or employment or any term or condition of employment, by urging, persuading,

and the discrimatory discharge of three additional employees not included in the order of reinstatement. These charges, however, were dismissed by the Board on recommendation of the Trial Examiner after hearing.[2]

It was stipulated that petitioner is an Indiana public utility corporation, primarily engaged in the production and distribution of electricity and steam at Indianapolis; that, incidentally, it also conducts in that locality a local retail department for the sale of electrical appliances; that it formerly owned and operated a radio broadcast station, WFBM, at Indian-

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warning, or coercing employees to join such labor organization and/or to resign from or refuse to join U. W. O. C.; A. B. T., or any other labor organization of its employees; or by any other act or acts; and

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purposes of collective bargaining or other mutual aid or protection.

"2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Make whole Russell Rennaker for any loss of pay * * * by payment * * * of the amount he normally would have earned as wages from January 15, 1938, until February 1, 1939, * * *;

(b) Offer to Sidney Collier and Thomas Elbreg, * * * immediate and full reinstatement to the positions which they formerly occupied * * * and make them, * * * whole for any loss of pay * * *;

(c) Post * * * notices to its employees, stating (1) that the respondent will not engage in the conduct which it is ordered to cease and desist in paragraphs 1 (a), (b), and (c) of the Order, * * * (2) that the respondent will take the affirmative action set forth in paragraphs 2 (a) and (b) of this Order, (3) that its employees are free to become or remain members of U. W. O. C.; * * * A. B. T.; or any other labor organization, and (4) that it will not discriminate against any employee because of membership in or activity in behalf of such labor organization; * * *;

[2] "AND IT IS FURTHER ORDERED that the complaint, as amended, in so far as it alleges that the respondent engaged in unfair labor practices in connection with Roy Payton, Harry Wilkins, and Dewey Logsdon, or in connection with surveillance of its employees and meetings of A. B. T. * * * or in connection with the formation of * * * I. P. and L. Employees Protective Association, be, and the same hereby is, dismissed."

apolis, but this had been sold and transferred to a separate corporation, with the approval of the Federal Communications Commission, as of August 1, 1939, which was prior to the date of completion of hearings on the complaint; that after this transfer petitioner no longer had any employees at that or any radio station.

Two complaints were filed against petitioner, one arising out of its relation to one of its employees in the radio station, and the other to five employees in the generating plants. They were consolidated for hearing and for purposes of this review.

Petitioner challenges the Board's jurisdiction to enter the order against it as to either complaint. With respect to the radio station it urges that it no longer owned or operated that business at the time of the order, and that the one employee it was alleged to have discriminatorily discharged was engaged in other equivalent employment when the order was entered. Hence, it argues that his discharge could not furnish the basis for a valid order for payment of wages lost thereby. With respect to the generating plants, it insists that jurisdiction was lacking because of the local nature of their operations, which it contends did not involve interstate commerce.

Under the issues joined by the complaint and answer it is obvious that the Board had jurisdiction to pass upon those issues, whether its determination of them was right or wrong. The questions here, however, deal with the correctness of the Board's order in the light of the facts, that is to say—did the alleged unfair labor practices actually threaten interstate or foreign commerce in a substantial manner, and was there substantial evidence to support the Board's findings?

It is conceded that the employees at the generating plants are not themselves engaged in interstate or

foreign commerce. In *Edison Co. v. Labor Board,* 305 U. S. 197, at p. 223, the Court said: "* * * where the employers are not themselves engaged in interstate or foreign commerce, and the authority of the National Labor Relations Board is invoked to protect that commerce from interference or injury arising from the employer's interstate activities, the question whether the alleged unfair labor practices do actually threaten interstate or foreign commerce in a *substantial manner* is necessarily presented. And in determining that factual question regard should be had to all the existing circumstances, * * *. The justification for the exercise of federal power should clearly appear. *Florida v. United States,* 282 U. S. 194, 211, 212. But the question in such a case would relate not to the *existence* of the federal power but to the propriety of its exercise on a given state of facts." (Our italics.)

The facts upon which the Board relied in support of its jurisdiction over petitioner's generating plants engaged in its operations as a public utility are similar in many respects to those described in the Edison Company case, *supra.* There the Court held that the provisions of the Labor Relations Act extended to public utilities engaged in supplying electricity, gas and steam wholly within the state (with the possible exception of that supplied for the operation of the Holland Tunnel), where a part of the service was to railroads, an airport, two telegraph companies, a telephone company and steamships engaged in interstate or foreign commerce, as well as to the various federal buildings in the city. Under the ruling of that case, we feel impelled to hold that the Board had jurisdiction over petitioner's generating plants. We shall discuss later the question of the power of the Board to enter the order with relation to petitioner as owner and operator of the radio station.

Petitioner next contends that even if the Board had jurisdiction to enter the order pertaining to employees other than those employed at station WFBM, there is no substantial evidence to support its findings that petitioner interfered with any rights guaranteed by § 7 of the Act to its generating plant employees, or that it discouraged membership in the C. I. O. union and encouraged membership in the I. P. and L. Employees Protective Association (to which we shall refer as the Association), or that it discharged Elbreg and Collier because of their activity in support of the C. I. O. union.

While the evidence was by no means undisputed, we can not say under the recent rulings of the Supreme Court, that there was none of sufficient substance to support the following facts as found by the Board. In February, 1937, before any union was organized or attempted to be organized, the six condenser pit operators employed at one of the plants had decided to make a collective request relating to working conditions through the chief engineer at that plant. Before they did so, the engineer, Goodrich, learned of their decision and talked to them individually, telling them they were absolutely wrong to try to approach petitioner collectively, and that while it would confer with individual operators about working conditions, it would not meet with them as a group. Thereafter, the C. I. O. undertook to organize workers at the generating plants, and after an organizational meeting, a local was formed, and Collier and Elbreg were elected president and secretary in August, 1937. There is evidence, though disputed, that the management sought by inquiry and admonition to discourage enrollment in that union. Under the many rulings of the Supreme Court relating to the conclusiveness of the Board's findings, we are constrained to hold that there was evidence in support of the finding that petitioner interfered with, restrained, and coerced its employees in the exercise of rights guaranteed by § 7 of the Act.

In December, 1937, petitioner's general manager sent two communications, the first addressed to department heads, and the second to Goodrich, superintendent of plants, calling for a general reduction in operating expenses, necessitated by failing business and the poor outlook for the future. He called for a reduction in personnel by not replacing employees who left, and by laying off employees wherever possible, stating that in such lay-offs, the generating system as a whole was to be considered, and employees were to be considered on the basis of merits, efficiency, and length of service with the company. In response to this requirement of reduction in the personnel, about seventy employees were discharged between January 4 and March 30, 1938, including Collier and Elbreg, who were discharged on January 5, 1938. Of this number only five were members of C. I. O., and the complaint as to the other three was dismissed on motion of respondent.

The Board found that Collier and Elbreg were discharged because of their activities in the union, which by that time had ceased to function. Petitioner introduced what would seem to us convincing evidence to the contrary, were we triers of the facts. However, in view of the fact that the Board is permitted to draw its own inferences from all the facts, and (under the ruling in *Labor Board v. Link-Belt Co.*, decided by the Supreme Court January 6, 1941), may rely upon such inferences in the absence of direct evidence in support of its findings, in opposition to direct evidence to the contrary, we are not permitted to disturb the order based on the finding of the discriminatory discharges.

The pertinent statute provides that "the findings of the Board as to the facts, if supported by evidence, shall be conclusive." The Supreme Court has held that the word "evidence" as here used means "substantial evidence," and "* * * is more than a mere scintilla. It means such relevant evidence as a rea-

sonable mind might accept as adequate to support a conclusion." *Edison Co. v. Labor Board,* 305 U. S. 197, at p. 229. The statute further provides that "the rules of evidence prevailing in courts of law and equity shall not be controlling." Section 10(b). The last cited case has this to say on that subject: "The obvious purpose of this and similar provisions is to free administrative boards from the compulsion of technical rules so that the mere admission of matter which would be deemed incompetent in judicial proceedings would not invalidate the administrative order. (Citing cases.) But this assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force."

In addition to these provisions, another section of the same law provides that the aggrieved party may have a review of the Board's order in this court. We have always presumed that this provision authorized us to correct what we in good faith thought was error of law in the Board's findings and order, including the determination whether the Board's findings were based on more than a scintilla of evidence, or upon such relevant evidence as a reasonable mind might accept as adequate to support the conclusion.

Counsel for respondent, however, contend that this is to weigh evidence, which we are not permitted to do, notwithstanding the fact that the statute authorizes the review, and does not limit the purposes of that review, except to say that the finding of the Board, if supported by substantial evidence, shall be conclusive. The effect of respondent's contention is that, if there is any evidence, either direct or inferential, the Board is the sole judge as to whether its findings and order are supported by substantial evidence, that is to say, whether they are based on a mere scintilla of evidence, or on such relevant evidence as a reasonable mind might accept as adequate to support its conclusions. This contention seems to be supported

in *National Labor Relations Board v. Waterman S. S. Co.*, 309 U. S. 206. There the Court said: "* * * Congress has left questions of law which arise before the Board—but not more—ultimately to the traditional review of the judiciary. Not by accident, but in line with the general policy, Congress has deemed it wise to entrust the finding of facts to these specialized agencies. It is essential that courts regard this division of responsibility which Congress as a matter of policy has embodied in the very statute from which the Court of Appeals derived its jurisdiction to act." This language was quoted in *National Labor Relations Board v. Link-Belt Co.*, decided by the Supreme Court on January 6, 1941. Obviously we have heretofore erroneously proceeded on the theory that whether the findings were based on no more than a scintilla of evidence or upon such relevant evidence as a reasonable mind might accept as adequate to support the conclusions, were questions of law and not of fact. In so ruling we have followed the unanimous decision of *Southern Pacific Company v. Pool*, 160 U. S. 438, 440, in the light of *Edison Co. v. Labor Board, supra*, at pages 229, 230.

In the Link-Belt case, *supra*, the Court further said: "'Slight suggestions as to the employer's choice between unions may have telling effect among men who know the consequences of incurring that employer's strong displeasure.' Nor does the Board lack the power to give weight to the activities of some of the supervisory employees on behalf of Independent, even though they did not have the power to hire or to fire. * * * If the words or deeds of the supervisory employees, taken in their setting, were reasonably likely to have restrained the employees' choice and if the employer may fairly be said to have been responsible for them, they are a proper basis for the conclusion that the employer did interfere." Under these decisions we are powerless to disturb the Board's findings.

The order as to station WFBM falls into two categories. Petitioner was directed to cease discouraging membership in the A. B. T. union, and it was also ordered to compensate Rennaker for the time lost between his alleged discriminatory discharge, January 15, 1938, and February 1, 1939, when he obtained equivalent employment elsewhere. Petitioner contends that the order was void in both respects.

As grounds for the asserted invalidity relating to the A. B. T. union, petitioner contends that inasmuch as it had sold the radio station prior to the hearing in this proceeding, it then had no employees eligible to membership in that union, and an order relating to it could in no way effectuate the purposes of the Act and dealt with matters that were wholly moot. There is no question but that the transfer entirely divested petitioner of all interest in the station, and that it retained no control whatsoever over it; and that a new corporation, WFBM, Inc., had been organized for the purpose of taking over the station prior to the issuance of the complaint against petitioner, articles of incorporation having been approved and filed as of May 23, 1939. The sale had been approved by the Federal Communications Commission July 18, and formal transfer was made as of August 1, 1939.

Section 10(c) of the Act, provides that if upon all the testimony taken, the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any unfair labor practice (as defined in § 8), then it shall state its findings of fact and shall issue and cause to be served on such person an order requiring him to cease and desist from such unfair labor practice and to take such affirmative action as will effectuate the policies of the statute. It was held in the case, *Labor Board v. Greyhound Lines,* 303 U. S. 261, that an order, lawful when made, did not become moot because it was *obeyed* or because changing circumstances indicated that the need for it might be *less* than when made. Under that ruling

we are not permitted to say that the negative order did not effectuate the purpose of the Act, provided there was evidence of discouragement of Rennaker with respect to his membership in A. B. T.

We are not unmindful that there is no evidence in this record that either the employer or any of its officers or managers had knowledge that Rennaker, prior to, or at the time of, his discharge, belonged to A. B. T., or that he ever contemplated joining. They denied having such knowledge. The undisputed facts are that he did not join until a short time before he was discharged, because he was not eligible. At that time no one in petitioner's employ was eligible to membership, and Rennaker never became eligible until A. B. T. changed its rules in that respect. No one in petitioner's employ, except Rennaker, was ever eligible to membership in A. B. T., and he said that he never informed petitioner or any of its officers that he had joined, or was contemplating a membership in A. B. T. He said that he merely signed the application and mailed it, and he did not say that he had informed any one of that fact. Before he was eligible, however, he did ask chief engineer Williams what he thought of A. B. T. Williams replied that he thought that would be the union for him to join. After I. P. L. was formed, Rennaker joined it, and a contract between it and respondent, covering all employees, was entered into on September 3, 1937. In November, 1937, he was notified that he was eligible to membership in A. B. T. Thereupon, he again asked Williams for advice as to what he should do. Williams replied: "No, I would answer the letter Russ and I would say that the boys now have an association of I. P. & L. employees and that you are no longer interested in A. B. T. That your present representatives, the employees' association, is serving the purpose admirably and there is no need for any outside connection at this time." Rennaker said: "I thanked him."

In view of the plenitude of the Board's power as set forth in the *Link-Belt* case, *supra,* we are not permitted to say that chief engineer Williams was not a supervisory employee, or that his words, taken in their setting, were not reasonably likely to restrain Rennaker's choice, or that the employer may not fairly be said to have been responsible for them, or that they do not constitute a proper basis for the conclusion that the employer did interfere. These are said to be matters of fact peculiarly within the province of the Board to decide, and its decision is held to be final. We are not called upon to decide the relative weight or merit of an imponderable as distinguished from a scintilla. Whatever that may be, we learn from the *Link-Belt* case, *supra,* that it is the duty of the Board to appraise the imponderables, subtle or otherwise, and by that appraisement we are bound.

Petitioner contends that the order to make whole Russell Rennaker, a broadcast technician at the radio station, is also void because at the time it was made Rennaker was no longer an employee. Its theory is that the Board's power to order back pay to employees discriminatorily discharged is limited to those cases where employees are lawfully ordered reinstated, and since Rennaker was otherwise employed when the order was made he cannot be considered at that time as an employee of petitioner. The question of the power of the Board to award back pay independently of reinstatement was raised in the case of *Phelps Dodge Corp. v. Labor Board,* decided April 28, 1941, by the Supreme Court. Although the Court did not pass upon the question expressly, the order appears to be within the power of the Board as defined by that decision, and no doubt was intended to be included among the "other minor objections to the Board's order," which the Court deemed it unnecessary to discuss, agreeing with the disposition of them by the court below.

The Board requested and consented to a modification of that part of its order which provided for payment by petitioner to public work-relief agencies of sums earned by discharged employees on work-relief projects. Petitioner's application to set aside the order of the Board is denied, and the petition of the Board for enforcement of its order is granted, subject to the modification suggested herein."

III

THE QUESTIONS PRESENTED

There are presented the following law questions:

1. Did "recent rulings of the Supreme Court", particularly in *N. L. R. B. v. Link-Belt Co.*, 311 U. S. 584 and *N. L. R. B. v. Waterman S. S. Co.*, 309 U. S. 206, curtail the lower court's power and as a matter of law render it "powerless to disturb" and require it to treat as conclusive the Board's several findings in this case relating to generating plant employees (as the lower court held they did), and did they preclude the lower court from making its own independent determination of the law question whether said findings are supported by evidence under the criterion established in *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197, 229, that such findings must be supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"? (The findings referred to in the foregoing question are that petitioner discriminatorily discharged Sidney Collier and Thomas Elbreg because of affiliation with the C. I. O. local, that it discouraged membership in the C. I. O. local and interfered with, restrained and coerced employees in the exercise of rights guaranteed in Section 7 of the Act, and that it supported and encouraged membership in I. P. and L. Em-

ployees Protective Association; also the findings subsidiary thereto.)

2. Did the failure of the lower court to make its own independent determination of the question whether said findings are supported by evidence under the established criterion, and its failure to point out in its written opinions legally sufficient evidence to support the challenged findings, and its failure even to discuss said finding relating to the employees' Association, constitute such a departure from the accepted and usual course of judicial proceedings in this type of case, so as to call for the exercise of this court's power of supervision?

3. Are the Board's said findings, including the subsidiary findings, supported by substantial evidence under the test of the established criterion?

4. Where, as here, the employer furnishes direct and positive evidence showing a reasonable and lawful explanation for the inclusion in a general lay off, economically necessary, of individuals (Collier and Elbreg) claiming to have been discriminatorily discharged because of union affiliation but who admit they never informed management of such affiliation and management testified it had no such knowledge and gave no consideration to such matter, does the Board have a burden to overcome such explanation with evidence to the contrary?

And if in such state of the evidence the Board does not offer evidence to overcome such explanation but makes a finding of discriminatory discharge, is *N. L. R. B.* v. *Link-Belt Co.*, 311 U. S. 584 authority for such finding on the theory that the Board may upon the whole record draw, and rely upon, an inference of discriminatory discharge (as was held by the lower court), notwithstanding

the direct evidence in opposition to such inference seems "convincing" to the reviewing court?

5. Did the unwillingness of a plant engineer to meet with a group of six unorganized condenser pit operators to discuss wage grievances affecting only them at a time prior to any self-organization of employees constitute interference, restraint and coercion of the employees in the exercise of rights guaranteed by Section 7 of the Act "Under the many rulings of the Supreme Court relating to the conclusiveness of the Board's findings", as the lower court held it did?

IV

THE REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

Petitioner respectfully says that the writ should be allowed for each of the reasons following:

1. The written opinions delivered below disclose that the important Federal question of what power the lower court has as a reviewing court in this and like cases to determine whether challenged findings of the National Labor Relations Board are supported by evidence, was erroneously decided in a way that conflicts with applicable decisions of this court, including the very cases cited (*N. L. R. B. v. Link-Belt Co.*, 311 U. S. 584; *N. L. R. B.* v. *Waterman S. S. Co.*, 309 U. S. 206) and regarded by the lower court as curtailing its power and rendering it "powerless to disturb" the Board's findings relating to generating plant employees.

In *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197, 229, this court established, and ever since has itself used, the criterion by which to determine the law question

whether a challenged finding of the Board is supported by evidence within the meaning of Section 10 (e) and (f) of the Act; that criterion being that such findings must be supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." In both of its opinions the lower court said that it had "always presumed" it was authorized to correct what it "in good faith thought was error of law in the Board's findings and order," including "the determination whether the Board's findings were based on more than a scintilla of evidence, or upon such relevant evidence as a reasonable mind might accept as adequate to support the conclusion"; and in its final opinion the court held that under recent rulings of the Supreme Court it was "constrained to hold" that there was "evidence in support" of the finding that petitioner "interfered with, restrained, and coerced its employees in the exercise of rights guaranteed by Section 7 of the Act," and, "Under these decisions we are powerless to disturb the Board's findings with respect to Collier and Elbreg"; also that in view of the *Link-Belt Company* case "* * * we are not permitted to disturb the order based on the finding of the discriminatory discharges", though the evidence to the contrary appears "convincing". The decisions of this court have not curtailed the power or duty of the lower court to determine on the basis of the established criterion whether findings of the Board are supported by evidence.

It is thus apparent that the lower court did not make its own independent determination of the law question whether said findings are supported by evidence judged on the basis of the established criterion, due to a misconstruction of the decisions of the Supreme Court in the *Link-Belt Company* case and in other cases, and therefore petitioner has not received the kind of review of the

order based on said challenged findings that Section 10 (f) of the Act, as interpreted by the decisions of the Supreme Court, contemplates.

2. The opinions in the case disclose that the Circuit Court of Appeals so far departed from the accepted and usual course of judicial proceedings in this type case as to call for the exercise of this court's power of supervision. Such accepted and usual course is for the court to determine upon a careful examination of the record whether the challenged order and findings of the Board are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," and then to set forth in the court's opinion, for public guidance, a sufficient review or exposition of the evidence to explain the court's decision. Such determination was not made in this case in respect to the parts of the order as to which enforcement was granted and the opinion does not set forth a review or exposition of evidence to explain the court's action. Rather, the court's action is by its opinions placed in the light of being compelled by something the Supreme Court has said regardless of what the Circuit Court of Appeals thinks of the evidence. If the accepted and usual course were followed in this case, a different result, favorable to petitioner, would follow.

3. Judged on the basis of said established criterion, the Board's findings viz.; that the two condenser pit operators (Collier and Elbreg) were discriminatorily discharged, that petitioner discouraged membership in the C. I. O. local and interfered with, restrained and coerced employees in the exercise of rights guaranteed in Section 7 of the Act, and that petitioner supported and encouraged membership in I. P. and L. Employees Protective Association, also the findings subsidiary thereto, are not sup-

ported by evidence and are clearly improper; and the Board is not entitled to enforcement of its order based on said unsupported findings.

4. The decision of the Circuit Court of Appeals that the Board's inference that Collier and Elbreg were discriminatorily discharged is necessarily binding on the reviewing court despite "convincing" direct evidence to the contrary and despite positive evidence establishing a reasonable and lawful explanation for their lay off, is in conflict with decisions on the same matters by other circuit courts of appeal, viz.; with the decisions in *Nevada Consolidated Copper Corp. v. N. L. R. B.* (C. C. A. 10, Aug. 27, 1941), 122 F. (2d) (Adv. Ed.) 587, and in *N. L. R. B. v. Tex-O-Kan Flour Mills Co.* (C. C. A. 5, Aug. 5, 1941), 122 F. (2d) (Adv. Ed.) 433 that fact inferences drawn by the Board must, in order to stand, have reasonable support in the evidence, also that where a reasonable explanation for the employer's action is shown by evidence the Board has the burden of establishing the falsity of the explanation.

5. The decision below that the unwillingness of the plant engineer at the Harding Street plant, in February, 1937, before there were any organizational activities, to discuss with an unorganized group of six condenser pit operators wage grievances affecting only them violated their rights under Section 7 of the Act "under the many rulings of the Supreme Court" is erroneous. Neither this, nor any court, seems to have held that the Act affords such an unorganized group the right to a group discussion of wages affecting only the individuals composing the group. The unwillingness of the plant engineer to discuss wages with said group did not constitute an unfair labor practice under the Act.

WHEREFORE, the petitioner, Indianapolis Power & Light Company prays that a writ of certiorari be issued under the seal of the Supreme Court directed to the Circuit Court of Appeals for the Seventh Circuit commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings in said Circuit Court of Appeals had in the case numbered and entitled on the docket as No. 7448, Indianapolis Power & Light Company, Petitioner, vs. National Labor Relations Board, Respondent, to the end that this cause may be reviewed and determined by the Supreme Court, and that the judgment and decree therein of said Circuit Court of Appeals be reversed by the Supreme Court, and that said order of the National Labor Relation's Board be by this court ordered set aside in its entirety, and for such further relief as to the Supreme Court may seem proper.

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